Supreme Court, U.S.
FILED

No. 10-61 JUL 7 - 2010

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In the

Supreme Court of the United States

STEVEN DWORKIN, KRISTEN HENRY, ROXY HAYES, and KAREN MILLS,

Petitioners,

v.

JOHN F. TAMBURO, doing business as MAN'S BEST FRIEND SOFTWARE, and VERSITY CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a court should apply the standard adopted by the majority of U.S. Courts of Appeals (as originally articulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) or the standard still used by the U.S. Court of Appeals for the Seventh Circuit (resorting to principles articulated in *Calder v. Jones*, 465 U.S. 783, 789-790 (1984) nearly 30 years ago prior to the *en masse* public availability and use of the Internet) when determining whether specific personal jurisdiction exists over a defendant for an alleged intentional tort that occurred solely on the Internet.

2) Whether the "expressly aimed" prong of the *Calder* "effects" test is satisfied solely by finding that an alleged injury occurred in the forum state or if "something more" is required to establish personal jurisdiction. *Calder v. Jones*, 465 U.S. at 789-780; *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (en banc).

PARTIES TO THE PROCEEDINGS

The Petitioners are Steven Dworkin, Kristen Henry, Roxy Hayes, and Karen Mills. The Petitioners are four of the five Appellees below.

The Respondents here and the Appellants below are John F. Tamburo, d/b/a Man's Best Friend Software, and Versity Corporation.

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Steven Dworkin, Kristen Henry, Roxy Hayes, and Karen Mills respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 601 F.3d 693 (7th Cir. 2010) and is reproduced in the Appendix herein at 1a-32a. The opinion of the District Court granting Petitioners' motion to dismiss is reported at 2007 U.S. Dist. LEXIS 75913 (N.D. Ill. Oct. 9, 2007) and is reproduced in the Appendix herein at 42a-65a.

JURISDICTION

The Court of Appeals entered its judgment on April 8, 2010. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Due Process Clause of the Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

735 ILCS 5/2-209(c)

A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

STATEMENT OF THE CASE

A. Introduction

This case concerns the continuing evolution of the Minimum Contacts Doctrine in the realm of personal jurisdiction and, specifically, its applicability to cases involving contacts between parties occurring solely via the Internet. This Court articulated what has become known as the Minimum Contacts Doctrine in *International Shoe Co. v. Washington* when it held that, "in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citing *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)).

The Doctrine continues to evolve as technology advances and courts, including this Court, develop standards and tests to evaluate personal jurisdiction in novel circumstances falling outside the original parameters of *International Shoe*. With respect to the issues in this case, lower courts, including nearly all of the U.S. Circuit Courts, have developed varying standards and tests to address personal jurisdiction

where the contacts between persons and forums occur solely on the Internet without any physical interaction.

This case involves two divergent tests developed for such situations: the test originally articulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122-24 (W.D. Pa. 1997) and since adopted by the majority of the Circuit Courts, on one hand, and the Seventh Circuit's forced application of principles articulated nearly thirty years ago in *Calder v. Jones*, 465 U.S. 783 (1984) to the Internet, on the other hand. This Court has not yet addressed this issue. Given the split between the Circuits, this case presents a ripe opportunity for this Court to establish a universal standard for addressing personal jurisdiction issues arising solely from electronic communications through the Internet.

As the Internet expanded and allowed individuals from one state to easily communicate about and with individuals in other states and countries, and allowed individuals to engage in commercial transactions with companies located in other states or countries without leaving their homes or communities, it became necessary to re-evaluate the Minimum Contacts Doctrine in the context of the Internet and electronic communications and commerce. Indeed, as one of the first courts to address these issues, the Western District of Pennsylvania in 1997 recognized the Internet age as a "global revolution" and that "the development of the law concerning the permissible scope of personal jurisdiction based on Internet use [was] in its infant stages." *Zippo Manufacturing Co.*, 952 F. Supp. at 1123.

In *Zippo*, the court had to determine whether the activities of a business through its website constituted sufficient minimum contacts with Pennsylvania to exercise personal jurisdiction over the business. *Id.* at 1126. In doing so, the court created a "sliding-scale" analysis for personal jurisdiction that focused on the "nature and quality of commercial activity that an entity conducts over the Internet" and the level of interactivity of the business' website. *Id.* at 1124. One end of the *Zippo* scale constitutes passive websites that simply convey information to those interested in it. *Id.* The opposite end of the scale constitutes commercial websites that clearly allow business to be transacted over the Internet. *Zippo*, 952 F. Supp. at 1124. The *Zippo* court described the middle of the scale as occupied by those websites that allow users to exchange information with the host computer. *Id.* The court held that, "[i]n these cases, jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." *Id.*

Since *Zippo*, the Circuit Courts have reached conflicting decisions regarding which situations, if any, the sliding-scale analysis should be applied. The majority of the Circuit Courts have adopted a standard that is consistent in both application and in contrast to the strained approach employed by the Seventh Circuit below.

In the instant case, the Seventh Circuit declined to adopt a jurisdictional test specifically for Internet-based cases, noting that the test laid out in *Calder* "speaks directly to personal jurisdiction in intentional-tort cases . . . [and] can be applied to cases involving tortious conduct committed over the Internet." Pet.

App. 17a; *Tamburo v. Dworkin*, 601 F.3d 693, 703 (7th Cir. 2010). In its opinion, the Seventh Circuit held that the district court improperly applied the *Zippo* sliding-scale analysis even though the Defendants' only contact with Illinois for purposes of specific personal jurisdiction occurred over the Internet and the Defendants never physically entered Illinois or sent any tangible goods to Illinois. Pet. App. 17a-18a.

In *Calder*, the publisher of a national magazine located in Florida published a defamatory article about the plaintiff, a film and television star living and working in California. *Calder*, 465 U.S. at 785. In addressing California's exercise of personal jurisdiction over the petitioners, this Court focused its analysis on the interaction between the defamatory conduct and the forum state. *Id.* at 788-90. As a result, the Court held that, "California is the focal point *both of the story and of the harm suffered*." *Id.* at 789 (emphasis added). Thus, California had personal jurisdiction over the petitioners based on the "effects" of the harm suffered. *Id.* In establishing the *Calder* "effects" test, this Court noted that jurisdiction was appropriate when the defendant's actions, or conduct in question, were "expressly aimed" at the forum state. *Id.*

In direct conflict with the Seventh Circuit's reliance upon *Calder*, the Fifth Circuit applied the *Zippo* test to a similar Internet-based defamation case. *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002). *Revell* involved a claim for defamation that took place solely on the Internet. *Id.* at 469. The plaintiff argued that the court should apply the *Calder* "effects" test to determine personal jurisdiction since the claim was based on an intentional tort. *Id.* at 473. The court, however, chose to use the *Zippo* "sliding-scale" test,

reasoning that Internet-based defamation was similar to online business torts and that the *Zippo* test did not conflict with the "effects" test for intentional torts. *Id.* at 471-72. Indeed, the Fifth Circuit identified the *Zippo* test as the proper method of "determining whether the operation of an internet site can support the minimum contacts necessary for the exercise of personal jurisdiction." *Id.* at 470.

As the use of the Internet by individuals and businesses continues to grow exponentially for purposes ranging from the exchange of private electronic communications to the publication of statements on public fora to the transaction of goods and services, and the borderless nature of these electronic communications continue to occur between individuals in different jurisdictions, states, coasts, and countries, individuals *must* be able to structure and engage in their online conduct with some degree of predictability. The Due Process Clause of the 14th Amendment requires this assurance of predictability. Indeed, this Court stated, "[t]he Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). If, within the United States, the U.S. Circuit Courts continue to apply inconsistent methods of analysis to interpret minimum contacts and exercise specific personal jurisdiction, it will be difficult, if not impossible, for individuals and businesses to know whether their Internet activity will render them liable to suit in a foreign state.

This Court should grant review to resolve the conflict among the Circuit Courts and clarify the particular question of how to properly analyze specific personal jurisdiction for intentional torts that occur solely on the Internet where no other contact occurs between a defendant and the forum.

B. Statement of the Facts

Plaintiff Versity Corporation was an Illinois corporation, and Plaintiff John Tamburo is a resident of Illinois. Defendant Steven Dworkin resided in Canada;[1] Defendant Kristen Henry resides in Colorado; Defendant Roxy Hayes resides in Michigan; and Defendant Karen Mills resides in Ohio.

Plaintiff Versity Corporation created a commercial computer program, The Breeder's Standard .NET ("TBS.NET"), accessed through an Internet Web browser that provides paying customers with access to dog breeding and pedigree information stored in a database. Already suffering from significant debts, Versity Corporation, solely owned by Plaintiff John Tamburo, later transferred its assets, including TBS.NET, to Plaintiff John Tamburo d/b/a Man's Best Friend Software ("MBFS").

At all relevant times, the individual Defendants each operated hobby websites that provided limited access to similar dog pedigree databases that they created and maintained free of charge. The Defendants' websites used a popular open source software program called 'Alfirin'. The Plaintiffs

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[1] Defendant Steven Dworkin is now deceased.

reverse engineered this software and, by doing so, enabled themselves to "hack" the Defendants' websites and exploit a "back door" to gain access to the databases behind the respective websites. That access violated the websites' terms of use which forbid data harvesting or commercial use of the data. The Plaintiffs imported the data harvested into the commercial TBS.NET database without the Defendants' consent or permission.

Defendants, after discovering the Plaintiffs took their information and had incorporated their work into the Plaintiffs' commercial product, individually voiced their displeasure in Internet discussion forums, on their own websites, and within emails to certain individuals. Some of the Defendants' comments informed readers that the Defendants offered the information at no charge; called for individuals to boycott the Plaintiffs' product; and/or, claimed that the Plaintiffs had stolen their work. The intensity of the statements differed among the individual Defendants.

All of the statements were made outside of Illinois. Indeed, the Defendants' posts to third-party websites constituted "public postings made from their respective locations outside of Illinois, permitting those with access to the sites to read the material." Pet. App. 54a.

The Plaintiffs alleged that they sustained "substantial economic harm" because of the postings. Pet. App. 67a-70a.

The Defendants' only physical contacts with Illinois arose through occasional participation in dog shows in

Illinois.[2] These contacts, though, did not in any way give rise to the claims in the Plaintiffs' Sixth Amended Complaint. Pet. App. 51a.

Applying the "sliding-scale" test from *Zippo*, the District Court below found that the Defendants' websites each established different levels of contact. At the height of its interactivity, Defendant Henry's website merely allowed individuals to enter and search for different pedigrees. Defendants Hayes and Mills had slightly more advanced websites. Defendant Hayes' website allowed users to submit voluntary donations to assist in Hayes' continued work. The website also provided preferential treatment to any individuals that make donations. Pet. App. 54a-56a. Defendant Mills' website linked to another site, owned by her, that solicited donations. However, the website from which the allegedly tortious activity stemmed did not solicit donations, but rather merely displayed information that she had collected. Pet. App. 56a. None of the websites in any way directly targeted citizens of Illinois, nor did they sell any products or services.

C. Procedural History

Plaintiff John Tamburo filed his original *pro se* complaint in 2004. The United States District Court for the Northern District of Illinois, Eastern Division later dismissed Plaintiff John Tamburo's Third

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[2] The Seventh Circuit notes that Defendants Henry, Mills, and Hayes have individually entered dogs in multiple shows taking place in Illinois and, "may individually have sold some of their dogs to customers in Illinois." Pet. App. 49a.

Amended Complaint holding that Versity Corporation was a principle party and, as a corporation required counsel to represent it, instructed him to find counsel should he seek to amend his complaint to add Versity Corporation. He did so.

On August 24, 2006, the Plaintiffs filed their Sixth Amended Complaint which contained twelve (12) counts including federal claims under the Sherman Antitrust Act and state tort claims such as defamation. On October 9, 2007, the District Court granted the Defendants' motion to dismiss the Sixth Amended Complaint and dismissed all counts based on lack of personal jurisdiction over each of the Defendants. Pet. App. 42a-65a.

On June 6, 2008, the Plaintiffs filed their Notice of Appeal and proceeded with an appeal to the Seventh Circuit. On April 30, 2010, the Seventh Circuit issued its opinion. The Seventh Circuit affirmed the District Court's ruling that Illinois lacked general jurisdiction over any of the Defendants. It dismissed all federal claims under the Sherman Antitrust Act for failure to state a claim and, consequently, affirmed the District Court's ruling that Illinois lacked specific jurisdiction over Defendant Wild Systems PTY, Ltd.

However, it also reversed the District Court in holding that there existed specific personal jurisdiction over Defendants Dworkin, Henry, Hayes, and Mills. In doing so, the Seventh Circuit resorted to an overly-broad interpretation of the *Calder* "effects" test instead of adopting and applying the already established, Internet-specific *Zippo* "sliding-scale" test. Pet. App. 1a-32a.

REASONS FOR GRANTING THE WRIT

1. This case brings to light a fundamental divide between the Circuit Courts in personal jurisdiction jurisprudence and, specifically, on the appropriate standard to be applied when determining whether a jurisdiction may exercise specific personal jurisdiction over a defendant whose alleged tortious activity occurred solely on the Internet. On one hand, the Seventh Circuit has recently, in the instant action, applied the *Calder* "effects" test articulated nearly thirty years ago in circumstances far removed from today's environment of instant electronic communications and the Internet. On the other hand, the Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits, acknowledging the advancement and development of technology since *Calder* and the need for law to remain current, each accordingly adapted their jurisprudence by adopting the more appropriate *Zippo* "sliding-scale" test to preserve traditional notions of "fair play and substantial justice." *See Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002); *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002); *Neogen Corp. v. Neo Gen Screenings, Inc.*, 282 F.3d 883 (6th Cir. 2002); *Lakin v. Prudential Securities*, 348 F.3d 704 (8th Cir. 2003); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *Soma Medical International v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999).

Unfortunately for the Defendants (who respectively reside in Canada, the Tenth Circuit, and two states within the Sixth Circuit), the instant matter arises from the Seventh Circuit's isolated and erroneous application of *Calder*. For, no relevant physical

contacts existed between any of the Defendants and the State of Illinois; the Defendants did not send merchandise or tangible goods to Illinois; the alleged tortious conduct occurred solely on the Internet; and the individual Defendants' websites were public not commercial. Despite these facts, the Seventh Circuit rejected the Internet-focused *Zippo* "sliding-scale" test in favor of the *Calder* "effects" test.[3] Pet. App. 17a. As will be demonstrated below, the instant circumstances bear a closer resemblance to the facts in *Zippo* than those in *Calder*. As such, the *Zippo* standard remains the better suited standard for this and similar situations.

To date, this Court has never had the opportunity to determine the appropriate standard for determining whether specific personal jurisdiction exists over a defendant whose alleged intentional tortious conduct occurs solely on the Internet. Until this Court intervenes and decisively resolves the conflict and divide between the Circuits on this issue, the divide and the questions it presents will continue to have far-reaching negative consequences on the essential components of predictability and fair play in specific personal jurisdiction jurisprudence.

Indeed, the conflict between the Circuit Courts and the existing uncertainty could cause individuals in situations similar to that of the Defendants (who reacted with speech to wrongful conduct originally

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[3] While the Seventh Circuit never specifically adopted the *Zippo* test, it did look to the interactivity of a website in determining personal jurisdiction in a products liability case. *Jennings v. AC Hydraulics A/S*, 383 F.3d 546, 549-50 (7th Cir. 2004).

directed at them) to use the courts for purposes of communicating displeasure at the conduct of others rather than merely engage in speech and risk exposure to litigation in foreign jurisdictions where those about whom they complain reside or do business. Alternatively, in those situations where such individuals could not afford to initiate litigation or risk defending litigation in a foreign jurisdiction, the uncertainty arising from the split among the Circuit Courts could deter speech altogether. In fact, this could occur absent adoption of an Internet-specific test or a very narrow application of *Calder*.

For these reasons, this Court needs to articulate the appropriate standard to be used by all Circuit Courts, and thus applied to all individuals in the United States, in determining questions of specific personal jurisdiction where alleged tortious activity occurs solely on the Internet.

2. Assuming, *arguendo*, that the *Calder* "effects" test should be used to decide issues of specific personal jurisdiction in intentional tort cases where all contact and conduct occurs online, this case then presents the question of whether the "expressly aimed" requirement should be read broadly, requiring only conduct that is "targeted at a plaintiff whom the defendant knows to be a resident of the forum state,"[4]

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[4] *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000), *overruled in part on other grounds by Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1207 (9th Cir. 2006) (en banc) (overruling "that the 'brunt' of the harm need not be suffered in the forum state.").

or, "more narrowly, [requiring] that the forum state be the 'focal point of the tort.'"[5]

In the instant case, the Seventh Circuit concluded that "the individual defendants' use of their public websites to defame an Illinois-based businessman and exhort readers to boycott his products can . . . be conceptualized as an electronic 'entry' into Illinois for jurisdictional purposes." Pet. App. 22a. The resulting ruling, in which the Seventh Circuit found specific personal jurisdiction over the Defendants, directly conflicts with decisions of other Circuits and decisions of this Court. *See Imo Industries, Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997); *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 223 F.3d 1082 (9th Cir. 2000); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008); *Calder v. Jones*, 465 U.S. 783 (1984).

For this reason, if the *Calder* "effects" test is the appropriate standard, this Court must resolve how narrowly a court should apply the test to again ensure predictability, fair play and substantial justice in matters of specific personal jurisdiction.

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[5] Pet. App. 19a. (citing *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071, 1074 (10th Cir. 2008)).

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS BY HOLDING COURTS SHOULD APPLY THE *CALDER* "EFFECTS" TEST INSTEAD OF THE *ZIPPO* "SLIDING-SCALE" TEST IN CASES WHERE ALL ALLEGEDLY TORTIOUS CONDUCT OCCURS ONLINE.

1. The Seventh Circuit Decision Below Directly Conflicts with the Fifth Circuit on the Question Presented and Clearly Creates a Circuit Divide.

Of the Circuit Court opinions that have addressed these issues, the facts underlying the Fifth Circuit's opinion in *Revell* most closely reflect the facts at issue below. Despite this factual similarity, the opinions from the Fifth Circuit in *Revell* and the Seventh Circuit below clearly conflict on the question of whether, in intentional tort cases where all relevant conduct occurs on the Internet, personal jurisdiction should be analyzed using *Zippo*'s "sliding-scale" test or *Calder*'s "effects" test.

The Seventh Circuit, in the opinion below, stated that it "hesitate[d] to fashion a special jurisdictional test for Internet-based cases." Pet. App. 17a. As a result, the Seventh Circuit adopted *Calder*'s "effects" test for all intentional tort cases, even in situations where the conduct occurs solely on the Internet. In doing so, the Seventh Circuit specifically endorsed the decision from the Western District of Wisconsin in *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154 (W.D. Wis. 2004), which declined to adopt *Zippo* in intentional tort cases.

In *Hy Cite*, the district court declined to adopt the *Zippo* test for two reasons: (1) it did not believe a website's level of interactivity should be determinative for personal jurisdiction and (2) it failed to see the merit in a specialized test. *Hy Cite Corp.*, 297 F. Supp. 2d at 1160. With respect to the first reason, the court argued that examples may exist where a passive website could still support a finding of jurisdiction based on the intentional harm inflicted, and where an interactive site would not support jurisdiction because it never aimed any conduct at the forum state. *Id.* However, the court in *Hy Cite* misinterpreted the scope of the analysis in *Zippo* as being limited solely to examining the interactivity of websites. Indeed, neither the court in *Zippo* nor the courts adopting *Zippo* have espoused such a limited examination.

In *Zippo*, after the court determined the website in question to be interactive, the court still considered "whether Dot Com's conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania." *Zippo Manufacturing Co.*, 952 F. Supp. at 1125-26. As such, the application of the *Zippo* "sliding-scale" test is not a determinative factor, but rather a starting point in Internet-based jurisdictional analysis that provides a "likelihood that personal jurisdiction can be constitutionally exercised." *Id.* at 1124.

The *Hy Cite* court based its second reason for rejecting the *Zippo* test on its interpretation of this Court's typical rejection of "mechanical" tests for personal jurisdiction and traditional preference for creating a flexible standard. *Hy Cite*, 297 F. Supp. 2d at 1160 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985)). However, the *Zippo* "sliding-

scale" test, although serving as a specialized test for Internet-based jurisdictional analysis, fulfills this Court's preference for a flexible standard in determining personal jurisdiction.[6] Indeed, the "sliding-scale" test is not outcome determinative, but allows courts flexibility in determining jurisdiction. Further, it enables the court to apply the standards of "fair play and substantial justice" that have always guided this analysis. *International Shoe Co.*, 326 U.S. at 316 (citing *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)).

The Fifth Circuit demonstrated the flexible nature of the *Zippo* "sliding-scale" test, and disproved the *Hy Cite* court's criticism of *Zippo* as outcome determinative in *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002). In *Revell*, a claim for defamation arose from a Harvard professor's article that was posted to a public "bulletin board" on a website maintained by Columbia University. *Id.* at 469. The article accused a Texas citizen of playing a substantial role in the cover-up of a terrorist plot. *Id.* The subject of the article attempted to bring both the author and Columbia

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[6] This Court has consistently sought flexibility in determining personal jurisdiction. In *Hanson v. Denckla*, the Court recognized the need for federal courts to be sensitive and responsive to changes in technology when analyzing personal jurisdiction. *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958). The Court in *Hanson* noted that jurisdiction would have to expand as communication and technology made physical contacts less necessary. It also carefully noted, however, that this would not spell the demise of personal jurisdiction limitations. *Id.* at 251. While decided well before the pervasiveness of the Internet, *Hanson* laid down a foundation for technological developments still to come.

University's trustees, located in New York, into a Texas court. *Id.*

Like the case at hand, the plaintiff argued that the court should apply the *Calder* "effects" test instead of the *Zippo* "sliding-scale" test to determine personal jurisdiction. *Revell*, 317 F.3d at 471-72. The Fifth Circuit, however, found this argument unpersuasive. It stated that "this circuit has drawn upon the approach of *Zippo* . . . in determining whether the operation of an Internet site can support the minimum contacts necessary for the exercise of personal jurisdiction." *Id.* at 470. The court reasoned that "[d]efamation has its unique features, but shares relevant characteristics with various business torts. Nor is the *Zippo* scale, as has been suggested, in tension with the 'effects' test of *Calder v. Jones* for intentional torts." *Id.* The court found the website to be partially interactive because the users could participate in open forums. *See id.* at 472. Users could post information, receive information from others, and receive information from the hosts of the site. *Id.* at 472. Declaring that the website is interactive is not the final step, however. After finding the website interactive, the court in *Revell* proceeded to "evaluate the extent of this interactivity . . . with respect to *Calder*." *Id.*

Like *Revell*, the case at hand confronts issues of personal jurisdiction for claims of intentional torts occurring solely on the Internet. However, the Defendants' websites are more passive than the website in *Revell* in that there is no direct user input. At the most interactive, one of the Defendants' websites allowed visitors to submit voluntary donations to assist in that defendant's continuing

voluntary efforts. Application of the *Zippo* test to this case would be consistent with the Fifth Circuit's analysis in *Revell* and, as demonstrated below, establish uniformity among the Circuit Courts.

2. The Majority of Circuits Have Either Indicated Agreement with the Fifth Circuit in Applying Zippo *or Applied* Zippo *Pending Supreme Court Clarification.*

Several additional Circuit Courts have also addressed the issue of personal jurisdiction with respect to claims resulting from conduct occurring entirely on the Internet. Each of these Circuits are addressed briefly below.

The Third Circuit adopted *Zippo* and continues to apply the same standard. In 2003, the Third Circuit stated that "[t]he opinion in *Zippo* . . . has become a seminal authority regarding personal jurisdiction based upon the operation of an Internet website." *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003). *Toys "R" Us* involved claims of trademark infringement and "cybersquatting" between Toys "R" Us, a New Jersey company, and Step Two, a Spanish company. *Id.* at 448. In its analysis, the court noted importantly that, in addition to operating a *Zippo*-interactive website, there must be more evidence that a defendant has "purposefully availed" itself of the laws of the forum state. *Id.* at 454-55.

When faced with the issue of personal jurisdiction based solely on Internet contacts, the Fourth Circuit stated that until the United States Supreme Court rearticulates a rule "in light of advances in technology," it would "adopt . . . the model developed in

Zippo." *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 713 (4th Cir. 2002). In determining "whether a Georgia-based Internet Service Provider ("ISP") subjected itself to personal jurisdiction in Maryland by enabling a website owner to publish photographs on the Internet in violation of a Maryland corporation's copyrights," *id.* at 709, the court concluded that, even though electronic signals from the ISP's facility were received in Maryland, the activity was *Zippo*-passive and did not subject the corporation to jurisdiction. *Id.* at 714.

The Sixth Circuit examined this same issue in *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883 (6th Cir. 2002). The website at issue in *Neogen* advertised the company's services; provided contact information; provided customers with passwords as part of a contract that enabled the use of the company's products from foreign locations; and advertised that it would perform its services "on any parent in any state." *Id.* at 890-91. Applying the *Zippo* test, the court determined that this website fell in the middle range of interactivity and did not suffice on its own to maintain personal jurisdiction over the defendant in Michigan. *Id.* Like the Fifth Circuit, the Sixth Circuit determined that "[a] defendant purposefully avails itself of the privilege of acting in a state through its website if the website is interactive to a degree that reveals specifically intended interaction with the residents of the state." *Id.* at 890 (citing *Zippo Manufacturing Co.*, 952 F. Supp. at 1124). To that end, the Sixth Circuit found that "[s]everal aspects of the website, however, support a finding of purposeful availment." *Id.* The court concluded that the defendant was subject to personal jurisdiction.

Additionally, the Eighth Circuit has indicated its approval of *Zippo*. *Lakin v. Prudential Securities*, 348 F.3d 704, 711 (8th Cir. 2003). In the context of determining general personal jurisdiction, the Eighth Circuit stated, "we agree with our sister circuits that the *Zippo* model is an appropriate approach in cases of specific jurisdiction." *Id.* at 711.

In discussing the determination of personal jurisdiction based upon websites, the Ninth Circuit noted that "the common thread, well stated by the court in *Zippo*, is that 'the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997) (citing *Zippo Manufacturing Co.*, 952 F. Supp. at 1124). In *Cybersell*, the Floridian defendant's website did nothing more than display information about their services and use the name at issue, Cybersell, at the top of the page. *Cybersell, Inc.*, 130 F.2d at 415. Like the Defendants in the case at hand, the defendants in *Cybersell* did nothing to encourage people in the forum state of Arizona to view the site, nor did they conduct any business transactions within the forum state. *Id.* at 419. As a result, the court held the defendant's contacts with Arizona through the website to be insufficient to warrant being haled into court in Arizona. *Id.* at 419-20.

The Tenth Circuit applied the *Zippo* "sliding-scale" test in *Soma Medical International v. Standard Chartered Bank* to determine whether a bank's website, which did nothing more than display information about their services to those who were interested, created sufficient contacts with Utah.

Soma Medical International v. Standard Chartered Bank, 196 F.3d 1292, 1299 (10th Cir. 1999). The court concluded its *Zippo* analysis by finding that, in the context of general personal jurisdiction, "[t]he website appears to be a 'passive website that does little more than make information available to those who are interested.'" *Id.* at 1297 (citing *Zippo Manufacturing Co.*, 952 F. Supp. at 1124).

In sum, nearly all U.S. Circuit Courts have either expressly adopted or indicated approval for the *Zippo* test in some form for determining whether specific personal jurisdiction exists over a defendant based on conduct occurring solely on the Internet. Despite this, the Seventh Circuit – being in this instance the court below – has rejected this near unanimity in favor of maintaining the application of the *Calder* "effects" test to such questions of personal jurisdiction. As such, the Seventh Circuit has highlighted (if not created) a significant split among the Circuits that must be resolved by this Court. Indeed, in its opinion below, the Seventh Circuit nearly calls for this Court to do so.[7]

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[7] The court acknowledged that other circuits, namely the Fourth, Fifth, and Ninth, had successfully applied the *Zippo* test to Internet-based tortious acts, though it was hesitant to do so. *Tamburo*, 601 F.3d at 703. In choosing to apply the *Calder* test to an Internet-based tortious act, the court acknowledged both the difficulty of such an application of the *Calder* "effects" test and the lack of Supreme Court guidance on the matter: "Extracting these requirements from *Calder* is reasonably straightforward; applying them in specific cases--especially cases like this one alleging tortious acts committed over the Internet--is more challenging." *Id.* at 703. "The Supreme Court has not elaborated on this requirement, *see Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984) (full citation added), and the

3. This Court Must Articulate the Appropriate Test and the Application of Such Test for Determining Specific Personal Jurisdiction on the Internet

On very similar factual circumstances, there clearly exists a conflict and split between the Fifth and Seventh Circuit on whether to apply the *Zippo* test (Fifth Circuit) or the *Calder* "effects" test (Seventh Circuit) to determine whether personal jurisdictions exists for conduct occurring solely on the Internet. A clear majority of the Circuit Courts endorse *Zippo* and, in many circumstances, expressly reject the "effects" test. Yet, a conflict remains which needs resolution by clear identification of the appropriate test to be applied in such circumstances.

Moreover, should this Court endorse the *Zippo* test, it also needs to clearly articulate the appropriate application of the *Zippo* test given its varied application among the federal courts. For, the significant uncertainty of the appropriate standard in this context makes it nearly impossible for an individual or business to create or utilize a website with any confidence as to where such conduct might cause he/she/it to be haled into court as a defendant against any potential claims arising therefrom.

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occasional difficulty in applying it has led to conflict among the circuits." *Id.* at 708.

II. THE SEVENTH CIRCUIT'S INTERPRETATION OF THE "EXPRESSLY AIMED" PRONG OF THE *CALDER* "EFFECTS" TEST CONFLICTS WITH SUPREME COURT PRECEDENCE AND OPINIONS FROM OTHER CIRCUIT COURTS

1. This Court, Through Its Decision in Calder, *Requires More than an Injury to the Plaintiff in the Forum State to Establish Minimum Contacts Between the Defendant and the Forum State.*

This Court held that personal jurisdiction is proper when a defendant has enough contacts with a forum state that they can, "reasonably anticipate [being] haled into court there." *World-Wide Volkwagen Corp.*, 444 U.S. at 297. In *Calder*, the Court considered what contacts would be sufficient to require an out-of-state defendant to be haled in to court in a state they never physically contacted. *Calder*, 465 U.S. at 788-90. In order to meet the requirements of the Due Process Clause and not offend "traditional notions of fair play and substantial justice," the Court developed a test to evaluate an out-of-state defendant's "effects" on the forum state. *Id.* at 789. The "effects" test requires (1) intentional conduct, (2) expressly aimed at the forum state, (3) when the defendant knows that the harm would be felt in the forum state. *See Dudnikov*, 514 F.3d at 1072 (finding the three prong test by "[d]istilling *Calder* to its essence"). The "expressly aimed" requirement is at issue here.

In the decision below, the Seventh Circuit has essentially interpreted the "expressly aimed" prong to

require only that a defendant knows where a plaintiff lives and that an injury occurs in the forum state for that defendant to be brought in to court within the forum state. Pet. App. 19a-23a.

Such a construction runs afoul of "traditional notions of fair play and substantial justice." In *Calder*, this Court determined that California, the forum state, was "the focal point of both the story and of the harm suffered." *Calder*, 465 U.S. at 789. However, the Court focused on more than the location of injury in its analysis. Specifically, the Court mentioned that the defendant's publication did more business in California than anywhere else; the defamatory article used California sources; and, the plaintiff's career (as a famous actress performing in California) and livelihood were especially impacted by the article's reception in California. *Id.* at 788-90. As such, *Calder* requires more than merely that an injury occurs in the forum state.[8] *Id.*

2. *The Seventh Circuit's Application of the* Calder *"Effects" Test Conflicts Significantly with the Majority of the Other Circuit Courts and Creates a Circuit Divide that this Court Must Resolve*

Since this Court's decision in *Calder*, the Circuit Courts have attempted to analyze and apply the *Calder* "effects" test with mixed results. The primary

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[8] Here, none of the factors noted in *Calder* are present beyond the alleged conduct injuring an Illinois resident within the forum state. As such, the facts giving rise to personal jurisdiction in *Calder* do not exist here.

source of uncertainty and variance among the Circuit Courts surrounds the "expressly aimed" prong of the "effects" test. Through their analysis and application of the "effects" test and the "expressly aimed" prong in particular, the Circuit Courts have reached different results as to what does and does not satisfy personal jurisdiction. The courts themselves have recognized this lack of uniformity. *See Dudinkov*, 514 F.3d at 1071.

The Third Circuit analyzed the *Calder* "effects" test in *Imo Industries, Inc. v. Kiekert AG*. *Imo Industries, Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998), a non-internet case. In *Imo,* the plaintiff, a corporation with its principle place of business in New Jersey, alleged that the defendant, a German corporation, tortiously interfered with the sale of its business by means of letters sent to the investment firm representing Imo in the sale. This conduct resulted in the cancellation of negotiations for the sale and a considerable loss to Imo. *Id.* at 257-58.

In its application of *Calder* in *Imo*, the Third Circuit focused on the "expressly aimed" prong stating that "the forum was the focal point of the tortious activity in the sense that the tort was 'expressly aimed' at the forum." *Id.* at 261. The court noted that an essential element of the "expressly aimed" prong was the defendant's knowledge that the "brunt" of the injury felt by the plaintiffs would occur in the forum in question. *Id.* at 266. Citing decisions by some of its sister circuits in *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997) (holding personal jurisdiction failed because the defendant had knowledge that missapropriating the plaintiff's trades secret would injure the plaintiff), *Southmark Corp. v.*

Life Investors Inc., 851 F.2d 763 (5th Cir. 1988) (stating personal jurisdiction was lacking because there was no evidence to show the defendant knew where the plaintiff's injury would be felt), and *Far West Capital, Inc. v. Towne*, 46 F.3d 1071 (10th Cir. 1995) (articulating that phone calls and sending letters are "not sufficient in themselves to establish minimum contacts."), the court reasoned that the mere fact a plaintiff feels the effect of the tortious conduct within the forum in question is simply not enough to satisfy the *Calder* test. *Id.* at 263. Rather, a plaintiff must prove that the defendant "expressly aimed" its conduct towards the forum and intended for the forum to be the focal point of the tortious conduct. *Id.* In short, the Third Circuit held that it is the defendant's *knowledge* of where the "brunt" of the injury occurs that subjects him to the personal jurisiction of that forum state. This counters the Seventh Circuit's broad view that personal jurisdiction is appropriate in the forum where the plaintiff's injuries are felt.

The Third Circuit in *Imo*, explicitly criticized the Seventh Circuit's view on personal jurisdiction, and rejected the Seventh Circuit's analysis in *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (holding jurisdiction proper in the forum state where the plaintiff felt the injury of the alleged tort). *Imo Industries, Inc.*, 155 F.3d at 263 (citing *Janmark*, 132 F.3d at 1202). It concluded that the Seventh Circuit's application of the *Calder* test was too broad and failed to take into account the defendant's "express aiming" or intention of the forum state to be the focal point of its tortious conduct. *Id.* at 263-64. The court criticized the *Janmark* decision for failing to "pay necessary attention to the defendant's knowledge and intent in committing the tortious activity." *Id.* at 264.

The Fourth Circuit, like the Third Circuit, has opposed the Seventh Circuit's broad views on personal jurisdiction, in *ESAB Group Inc. v. Centriut, Inc. ESAB Group Inc.*, 126 F.3d 617, a non-internet case. In *ESAB,* the plaintiff, a company located in South Carolina, accused another company and various individuals of conspiring to appropriate trade secrets and customer lists from it. *Id.* at 621. The court considered specific personal jurisdiction and applied the *Calder* "effects" test. It determined that the activities of the defendants in appropriating the trade secrets were focused on customers located throughout the United States *and not, as the plaintiff argued, on South Carolina alone. Id.* at 625-26. With respect to the plaintiff's unfocused appeal to *Indianapolis Colts*, the Fourth Circuit clearly stated that jurisdiction cannot be based solely on the forum in which an injury occurs and that a defendant must also "enter" the state in some fashion. *Id.* at 625 (citing *Indianapolis Colts, Inc.*, 34 F.3d at 412). *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd. Partnership*, 34 F.3d 410 (7th Cir. 1994). The court explained that to allow jurisdiction based only on the forum in which the injury occurred would make jurisdiction always appropriate in the plaintiff's home state and that, "although the place (of injury) is plainly relevant to the inquiry, it must ultimately be accompanied by the defendant's own contacts with the state if jurisdiction over the defendant is to be upheld." *ESAB Group, Inc.* at 626.

The Fourth Circuit's reasoning in *ESAB Group Inc.* directly conflicts with the Seventh Circuit decision below. Indeed, based on the opinion below, the Seventh Circuit will find jurisdiction proper in a forum whenever an injury occurs within the forum regardless

of whether the defendant's conduct has been directed throughout the United States – as the case in *ESAB Group Inc.* and the instant case. This represents a significant distinction between the interpretations of *Calder* that needs to be resolved by this Court.

The Ninth Circuit continued the development of the Fourth Circuit's viewpoint on personal jurisdiction by requiring "something more" in addition to the plaintiff's place of injury. *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d at 1087 (9th Cir. 2000) *overruled in part on other grounds by Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1207 (9th Cir. 2006) (en banc). In *Bancroft*, the plaintiff, a small California business, sought a declaratory judgment against Augusta National Inc. ("ANI") with respect to Bancroft's ownership of the domain name "masters.com." *Id.* at 1084-85. The district court granted ANI's motion to dismiss for lack of personal jurisdiction, but the Ninth Circuit reversed and remanded upon application of the *Calder* "effects" test. *Id.* at 1087, 1089.

In applying *Calder*, the Ninth Circuit recognized the "struggle" that other courts had faced when applying the "effects" test to personal jurisdiction. *Id.* at 1087. In a decision similar to the Third Circuit's finding in *Imo,* the court reasoned that there must be "something more" than just an injury within the forum state in order to satisfy personal jurisdiction. *Id.* The court determined that the "something more" was the "expressly aimed" concept developed in *Calder* and that "expressly aimed" is satisfied when a defendant knowingly targets the plaintiff in the forum state and directs its tortious activities into that state. *Id.* In applying the "expressly aimed" concept to *Bancroft*, the

Ninth Circuit found the test met when the letters sent by ANI were expressly aimed at Bancroft, targeted them individually as a business in California, and ANI knew that the effect of their letters would be felt in California. *Id.* at 1088.

The Ninth Circuit further distanced itself from the Seventh Circuit's interpretation of *Calder* in *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004), a non-internet case. In *Schwarzenegger*, an Ohio car dealership used photos of Arnold Schwarzenegger as the Terminator in its advertisements. *Id.* at 799. The court held that, although the advertisements eventually caused Schwarzenegger harm in California and the defendant knew Schwarzenegger lived in California, this did not suffice to allow jurisdiction over the defendant in California. *Id.* 806-07. The court summarized its previous decisions in similar cases and noted that where jurisdiction had been found there existed "something more" in each case. *Id.* at 807. This "something more" is lacking in the Seventh Circuit's previous opinions and the opinion below, resulting in a circuit split that necessitates the Supreme Court's guidance.

The Tenth Circuit developed yet another interpretation of the *Calder* "effects" test. In its interpretation of *Calder*, the Tenth Circuit took a somewhat different approach and utilized a "bank shot" analogy to explain its holding. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1075 (10th Cir. 2008). In *Dudnikov*, the plaintiffs were a husband and wife team living in Colorado who frequently sold fabric on the online auction site eBay located in California. *Id.* at 1068. The defendant, a Delaware

corporation with its principal place of business in Connecticut, represented an artist who believed the plaintiffs were infringing his rights by using portions of his images on the fabrics they were selling. *Id.* Operating under this belief, the defendant contacted eBay and had it suspend the auction by submitting a notice of claimed infringement pursuant to the rules of eBay's "Verified Rights Owner" program. *Id.* Upon receiving the notice, eBay suspended the auction and notified the defendant that the suspension would be lifted after 10 days if legal proceedings were not initiated by the parties. *Id.* at 1068-69. The plaintiffs, upon receiving notice of the infringement, decided to take action and filed for a declaratory judgment clarifying that they were not infringing on the defendant's copyrights. *Id.* at 1069.

Even though the conduct in question, the notice of infringement sent to eBay in California, did not target the plaintiffs in Colorado specifically, the Tenth Circuit utilized the basketball "bank shot" analogy and reasoned that the defendant had utilized eBay in California with "the ultimate purpose of cancelling plaintiffs' auction in Colorado." *Id.* at 1075. The Tenth Circuit purported its analysis of personal jurisdiction in *Dudnikov* to be in line with the Supreme Court's landmark holding in *Burger King*. *Id.* at 1075. As a result, the court could now find personal jurisdiction over an individual who established contacts in one state, with the express aim of using those contacts to affect the plaintiff in the forum state. *See id.* at 1074-77. At a minimum the Third, Fourth, Ninth and Tenth Circuits require analysis of the defendant's knowledge or actions in determining personal jurisdiction. This counters the Seventh

Circuit's analysis that focuses solely on the plaintiff's injury and disregards the defendant from its analysis.

The Seventh Circuit and the Third Circuit have reached holdings that directly conflict with one another on whether alleged harm occurring within a forum state is sufficient to satisfy the "expressly aimed" prong of the *Calder* "effects" test. Appellate decisions on the issue display a wide range of possibilities, from requiring "something more" to allowing jurisdiction based on actions similar to a "bank shot" in basketball. *Compare Bancroft & Master, Inc.*, 223 F.3d at 1087 ("We now conclude that 'something more' is what the Supreme Court described as 'express aiming' at the forum state") *with Dudnikov*, 514 F.3d at 1075 (stating defendant's "express aim" reached Colorado, via California, like a bank shot in basketball). Similar to the *Zippo* discussion above, the discrepancies between the Circuit Courts here do not allow for any predictability for individuals conducting themselves on the Internet. Further, the circuit courts could benefit from the discretion and guidance this Court can provide.

3. *This Court Must Articulate the Appropriate Interpretation of the "Expressly Aimed" Prong Within the Calder "Effects" Test*

There exists a very clear split between the Circuit Courts as to whether an alleged injury occurring in the forum state sufficiently satisfied the "expressly aimed" requirement of *Calder* or if "something more" is required. Apart from the clear division between the majority of Circuit Courts that require "something more" and the Seventh Circuit that does not, there also exist differences among the Circuit Courts as to what

constitutes the "something more" they require. Consequently, this Court must resolve the differences among the Circuit Courts by deciding affirmatively whether "something more" is required, as the majority of the Circuit Courts have concluded, and delineate what constitutes "something more." The current lack of clarity between the Circuit Courts makes it nearly impossible for a person to know what actions may result in being haled into court in a given forum. This uncertainty violates the guiding principles of predictability and substantial justice required by this Court and the United States Constitution. *See World-Wide Volkswagen Corp.*, 444 U.S. at 297; *International Shoe Co.*, 326 U.S. at 316 (1945).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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